

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 95 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KAVAJI MACHLA CHOUDHARI

Versus

STATE OF GUJARAT

Appearance:

MR RM CHHAYA for NANAVATY ADVOCATES for Petitioners
MR SP DAVE, LD. APP for the respondent-State.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 04/05/98

ORAL JUDGEMENT

1. This appeal has been directed against the impugned judgment and order dated 18/1/1996 rendered by the Ld. Addl. Sessions Judge, Surat, in Sessions Case No. 259/93. The appellants herein, referred to as 'the accused' or 'accused persons', came to be convicted of the offences punishable u/Ss. 143, 147, 148, 323 and 304 (2) read with sec. 149 of the Indian Penal Code (for short 'IPC') and they were sentenced to undergo rigorous

imprisonment (RI) for a period of one year and to pay fine of Rs.250/- in default to undergo simple imprisonment for a period of one month for the offence punishable u/S. 323 read with section 149 of the IPC AND to undergo RI for a period of five years and to pay fine of Rs.250/- in default to undergo simple imprisonment for a period of six months for the offence punishable u/S. 304 (2) read with section 149 of the IPC.

2. The facts of the prosecution case as have been summarized in the impugned judgment might be noted : On 5/7/1993 the complainant Singabhai Rajyabhai was carrying on the dealings of his business at his shop when one Ramsing Afjiya Vasava and one Khataria Sama Vasava were also sitting in the shop at about 7.30 O'clock in the evening. One Sunil Macha Choudhari, one Mohan Macha Choudhari and one Pratap Machla Choudhari had been to the complainant's shop for fetching Beedi box (traditional cigarette box). At that time the complainant asked Mohan Macha Choudhari what was the rate of labour charge fixed when the people collected on the eve of the occasion of Pooja to be offered to village deity. Mohan Macha replied that he, his younger brother Sunil and Pratap Machla talked about keeping the labour rate for one day at Rs.12/- and Chhagan Machla Choudhari, Kaveji Machla Choudhari, Mansing Macha Choudhari, Ramsi Vagadia Choudhari and Ramji Ramsi Choudhari (accused persons) objected to the rate so suggested and asserted for fixing rate at Rs.15/- per day. Since the rate of Rs.15/- per day was not acceptable, there was a quarrel between two parties and, therefore, the rate of labour charges was not fixed on that day. When they were leaving the shop after having Beedi box as stated above, the accused persons, armed with the weapons like axe and sticks reached the place, namely the open space in front of the complainant's house. At that time the electric light in the complainant's shop was on. It was around 8.00 O'clock at night when the accused persons stopped the aforesaid Sunil, Mohan and Pratap and asked why they objected to fixation of rate of labour charges suggested by them and that they would not spare them. Saying so accused Kaveja Machla Choudhari (accused no.1) armed with the axe asked accused Ramsinh (Ramsinh Vagadia) why they were looking and that they should kill them (persons of the other party). While so provoking the other persons accused No.1 Kaveji Machla gave the axe blow on the rear portion of Sunil Macha's head with the result that Sunil Macha had fallen down. Seeing the incident the complainant came out of his shop and saw Chhagan Macha Choudhary, Mansing Macha, Ramsi Vagadia and Ramji Ramsi beating Sunil Macha, who had fallen down, with their

sticks. Upon the complainant, Ramsing Khatadia, Mohan Macha and Pratap Machla intervening Chhagan Machla gave a stick blow on the hand of Mohan Macha. So all of them shouted with the result that the five accused persons ran away with their weapons. Since Sunil Macha was bleeding from the blow which struck his head on rear side, he could not take water and after some time he (said Sunil Macha) died. Since it was night time and since it was raining and since there was no means of transport available for going to Mandvi, the complaint was lodged in the morning of the next day.

3. After recording the evidence and the statements of the accused persons and after hearing the submissions made on behalf of both the sides the Ld. Addl. Sessions Judge rendered aforesaid judgment of conviction and sentence. The accused persons have challenged the same before this Court.

4. It has mainly been submitted on behalf of the accused persons that the prosecution has failed to establish the offence u/Ss. 143, 147, 148 and 149 of the IPC. For that purpose the evidence adduced by the prosecution was read before this Court. It has been submitted that the case was one of sudden quarrel and fight between two parties in which 3 accused persons had also received injuries. Accordingly it has been submitted that the facts of the prosecution case could not be said to be established beyond reasonable doubt so as to hold all the accused persons guilty of the charges flowing from the charge of unlawful assembly. It has also been submitted that looking to the facts of the case, the sentence imposed against accused persons is very excessive. Learned A.P.P. appearing for the State supported the judgment for the reasons set out by the Ld. Addl. Sessions Judge.

5. For the purpose of appreciating the submissions made on behalf of the parties to this appeal, it would be necessary to refer to the prosecution evidence for finding out whether in fact there was a sudden fight or not at the time of the incident.

6. In the first instance the exaggerations in the prosecution case as set out by the complainant have been pointed out by making a reference to the point of time when the incident occurred and the location of the shop in which the complainant and other two persons were sitting. Reference in this connection has been made to the map appearing at page 51 which shows the shop of the complainant having no window or aperture except one entry

door opening in the Varanda/Chowk portion, which again appears to have been shown as closed by walls on both the sides. It has come in the prosecution evidence that the complainant was sitting inside the shop and, therefore, he could not have any occasion to watch or be an eye witness to the incident as has been narrated by him. The other two persons were sitting in the Varanda portion in such a manner that even they could not have the direct sight of what happened at the place of the incident. On a look at the map exh. 16 appearing at page 51 of the paper book and comparing the location as has been deposed to by the complainant and other witnesses in respect thereof it does throw doubt upon the prosecution version about the complainant and other two persons sitting in/at the shop having had the immediate sight of the incident when it occurred. This aspect would merit consideration while appreciating the submissions made on behalf of the appellants. Another aspect of the matter is that it was nearly 8.00 O'clock at night when it was also raining. That would make the submissions made on behalf of the appellants more probable for the complainant and other two persons who were present at the complainant's shop having hardly any sight of the incident as it occurred. Bearing in mind the state of prosecution evidence in the context of the aforesaid unimpeachable circumstances, it would clearly appear that the complainant and other two persons might hardly have heard any conversation between the accused party and other persons one of whom unfortunately died as a result of the incident. It might be noted from the cross-examination of P.W. 4 Khataria Samabhai exh. 26 that he and other person were sitting on the bench in the Varanda of the complainant's shop in such a manner that they could see the entrance door of the shop; that would mean that they were having their back towards the wall of the Varanda which again was abutting in the open space, at some distance of which space the incident occurred. Having gone through the evidence adduced by the complainant Singabhai Rajiyabhai P.W. 3 exh. 24 and P.W.4 Khataria Samabhai exh. 26, I am of the opinion that these witnesses could hardly have any occasion to see exactly how the incident occurred. These witnesses clearly appeared to have reached the place of incident soon after the occurrence of the incident.

7. It is not in dispute that there was a cross case bearing Sessions Case No. 255 of 1993 arising out of the same incident. It has not been placed on evidence as to what happened in that sessions case. It is also not known to the learned advocate appearing for the appellants as to what happened in that sessions case.

The Ld. A.P.P. also could not throw any light about what happened in that sessions case. The fact remains that there was a cross case bearing aforesaid sessions case arising out of the same incident. The Ld. Addl. Sessions Judge has made reference about the cross case having been conducted before him for the purpose of coming to the conclusion that the presence of the two persons was established beyond reasonable doubt. Thus it would clearly appear that there was a cross case arising out of the same incident. Simply because the persons of the accused party and the persons of the other party had an occasion to be in the open space nearby the complainant's shop, it could not be inferred that the persons of accused party had chased the persons of the other party. The fact of chasing them has got to be established by prosecution beyond reasonable doubt and in absence of evidence such inference could hardly have been drawn. There is one more circumstance which is very vital and would need serious consideration while dealing with the submissions made on behalf of both the sides. It is not in dispute that three accused persons did receive injuries as a result of incident in question. This will be visualized not only from the prosecution evidence but also from the judgment of the Ld. Addl. Sessions Judge. The medical certificates with regard to such injuries are also placed on record (Exhs. 18, 19 and 20) (See deposition of P.W. 1 Dr. Navinchandra Revabhai Choudhari, exh. 17). This is a vital circumstance which would indicate that the prosecution could not establish beyond reasonable doubt the appearance of the accused persons (five in number) with the required object of either assaulting the persons of the other party or causing such injuries as would result in death of one or other persons of the other party.

8. Under the aforesaid circumstances, when there was no satisfactory and acceptable evidence to prove the formation of any unlawful assembly and common object of committing crime alleged against the accused persons and when the whole fight would appear to have started suddenly on the spur of moment in a heat of passion, the accused persons could only be liable for the individual acts committed by them and could not be convicted for the offences under the provisions of sections 147, 148 and 149 or with the aid of such provisions.

9. Dealing with the individual acts of causing injuries the evidence is clear enough to find that the accused no. 1 Kevaji Machla Choudhari had in fact given the axe blow to the deceased Sunil, which ultimately resulted in termination of his life. Rest of the accused

persons could hardly be said to be responsible for giving any such injuries as would have resulted in either grievous hurt or death of aforesaid Sunil. All the same they were responsible for giving stick blows which resulted in simple hurt to the deceased as well as P.W. 7 Mohanbhai Machlabhai. For that purpose reference was made to the evidence of Dr. Kishorbhai Kantilal Soni, exh. 21. It appears that the Ld. Addl. Sessions Judge has overlooked the aforesaid salient aspects of the prosecution evidence while rendering conviction taking resort to the provisions of sections 143, 147, 148 and 149.

In above view of the matter and bearing in mind the facts of the case, the conviction and sentence imposed against accused no. 1 Kavaji Machla Choudhari shall have to be maintained; whereas conviction and sentence of rest of the accused persons, namely Chhagan Machla Choudhari, Mansing Macha Choudhari, Rumasi Vadgiya Choudhari and Ramji Rumasi Choudhari will have to be altered. The said four accused persons will stand convicted for the offences punishable u/S. 323 of the IPC whereas they will stand acquitted for the offences punishable under rest of the other provisions of the IPC charged against them. The conviction will stand accordingly altered. Their sentence u/s. 323 without the aid of section 149 as rendered by the Ld. Addl. Sessions Judge will remain, where as their sentence under the rest of the other provisions of the IPC will stand quashed and set aside. I am told that the accused no.2 Chhagan Machla Choudhari, accused no. 3 - Mansing Macha Choudhari, accused no. 4 - Ramasi Vadgiya Choudhari and accused no.5 - Ramji Rumasi Choudhari have been in jail since the date of their conviction by the trial Court, namely since 18/1/1996. Thus they have undergone the sentence which has been confirmed by this judgment. They will therefore, be released and set at liberty immediately if not required for any other case. Fine, if paid by them for the sentence u/S. 304 (2) read with section 149 of the IPC shall be refunded to them.

This appeal is accordingly partly allowed.

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